

NTSB Order No.  
EM-72

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 1st day of December 1978.

OWEN W. SILER, Commandant, UNITED STATES COAST GUARD,

vs.

NICHOLAS A. ERNSER Appellant.

Docket ME-67

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming a suspension of his merchant marine officer's license No. 428069.<sup>1</sup> The license qualifies appellant, inter alia, as a first-class pilot of vessels on San Francisco Bay and its tributaries to Stockton, California. He was charged with negligent pilotage of the SS GULFKNIGHT, an inspected tankship of the United States, in the Carquinez Strait section of this waterway,<sup>2</sup> for colliding with a properly charted fixed structure, the Ozol pier, which is located along the south bank.

The appeal to the Commandant (Appeal No. 2091) was taken from an initial decision entered by Administrative Law Judge Charles J. Carroll, Jr following a full evidentiary hearing.<sup>3</sup> Throughout the proceedings, appellant has been represented by counsel.

On May 24, 1975, appellant was assigned to pilot the GULFKNIGHT from its berth at the Phillips Amorco dock, located on the south bank of the Strait about 1.2 miles east of the Ozol pier, on an outbound transit. It was necessary for the vessel to make a

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<sup>1</sup>The decision was issued during Admiral Siler's term as Commandant. He has since been succeeded by Admiral J.R. Hayes.

<sup>2</sup>It is undisputed that appellant was acting under authority of his federal pilot's license at the time. 46 U.S.C. 364.

<sup>3</sup>Copies of the decisions of the Commandant and the law judge are attached.

180° left turn across the channel to proceed downstream. At 1935 hours, while this maneuver was in progress, appellant with the pilot of the SS EXXON NEWARK on a port-to-port passage. The EXXON NEWARK had anchored 120 to 125 yards off the northeast corner of Anchorage No. 25 and was making a right turn from its northwesterly heading, expecting to proceed directly to the berth which GULFKNIGHT was vacating. Anchorage No. 25 is an area on the south side of the channel where the Ozol pier extends in a "T" shape some 800 feet offshore. As both vessels were turning with tug assistance, the SS HOUSTON had arrived from sea and dropped anchor inside Anchorage No. 25 about 600 feet to the north of Ozol pier.

The law judge found that the GULFKNIGHT, after completing its turn and releasing its tug, was moving with an ebb tide at an estimated speed of 5 to 6 knots through the water toward the EXXON NEWARK, which was still attempting to turn; that the vessels were at least 3/4 mile apart at 1948-9 hours when appellant was notified that EXXON NEWARK "had a rudder problem"; that appellant reduced GULFKNIGHT's speed to slow ahead before receiving notification, 2 minutes later, that EXXON NEWARK's bow had "stopped turning"; that appellant then elected to make a starboard-to-starboard passage of both vessels with both pilots' consent, proceeded on course for 2 more minutes before ordering full ahead, turned hard left, and again reduced engine speed as the first passing was made at 1954 hours; that he turned hard right and went full ahead 1 minute later to pass the HOUSTON, a maneuver which brought his vessel about two ship lengths from the Ozol pier; and that he immediately ordered emergency full astern and dropped anchor but not in time to stop GULFKNIGHT from striking the pier, cutting "through the catwalk on the easterly extension thereof, and through the shore catwalk and the two shore pipelines, igniting the shore connections..." (I.D.10, 14-16). The law judge concluded that appellant was guilty of negligence, as charged, for continuing his vessel's approach despite the warnings from EXXON NEWARK, and for attempting to pass the HOUSTON with "a maneuver, possible with a light tug, but impossible with [GULFKNIGHT] a supertanker of more than 20,000 gross tons, loaded with cargo...in a constricting channel upon an ebb tide" (I.D. 21). A similar act of negligence on appellant's record for which he received an official warning in December 1974 was considered but had no effect on sanction. The law judge noted that a suspension for as long as 12 months was authorized by Coast Guard regulations for the second such offense<sup>4</sup> but decided that a long period was unnecessary for remedial purposes. He thereupon imposed an actual suspension of 1 month with a probationary

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<sup>4</sup>46 CFR 5.20-165.

suspension of 3 months, which was affirmed by the Commandant.<sup>5</sup>

In his brief on appeal, appellant contends that a port-to-port passage of the EXXON NEWARK would have involved serious risks, that he had to make a "snap decision" to pass on the starboard side, and that his subsequent actions in the stress of such an emergency should be excused under the in extremis doctrine. Counsel for the Commandant has filed a brief in opposition.

Upon consideration of the briefs and the entire record, we have concluded that appellant's negligence was established by reliable, probative, and substantial evidence. In addition to our further findings herein, we adopt those of the law judge as our own. Moreover, we agree that the sanction is warranted.

Appellant's first contention rests on his testimony that the EXXON NEWARK "appeared" to have moved so far toward the shoal line on the north side of the channel that his vessel was in danger of shearing into it or running aground on a port-to-port passage (Tr. 184-187). Cross-examination disclosed, however, that he neither looked at his radar nor took bearings of any sort to verify his visual impressions (Tr. 199-201). He thus provided no evidence of the vessel's exact position in the channel.

Anchor bearings were taken aboard the EXXON NEWARK and its position was again determined by radar bearings at the point of deciding on the starboard passage (Tr. 26, 46-47). In reference to the navigation chart,<sup>6</sup> these readings indicate that the vessel was close to its anchored position when it stopped turning. The master of the EXXON NEWARK presented this evidence. Its pilot also testified that the vessel was in a tight, pivoting turn (Tr. 92), which was corroborated by the HOUSTON's pilot.<sup>7</sup> Appellant offered nothing of comparable probative value. By the clear weight of the evidence, therefore, we find that the EXXON NEWARK was making no northward headway such as he described and was not obstructing a port-to-port passage.

Appellant's argument on appeal is that the other navigators

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<sup>5</sup>The suspension order has been stayed pending disposition of this appeal. See 46 CFR 5.30-35(c); 43 Fed. Reg. 6778-9, February 16, 1978.

<sup>6</sup>Coast and Geodetic Survey Chart No. 5574 (ALJ Ex. III).

<sup>7</sup>Witnesses used photocopies or transparencies of the area in question as depicted on the navigation chart to plot the various vessel positions and distances between them at relevant times.

agreed with his version of the risks confronting the GULFKNIGHT. This is also unfounded. The master and pilot of the EXXON NEWARK testified that a safe passage was possible on either side of their vessel (Tr. 79-80 100-101). The HOUSTON's pilot did not object to a starboard passage of his vessel but testified that he would have passed both vessels on the port side in appellant's place (Tr. 157). Obviously these opinions buttress the evidence previously described, indicating that there was no danger to appellant's vessel if he had exercised due care under the circumstances.

The in extremis doctrine presupposes that the vessel's navigator is not afforded a reasonable opportunity for decision, and is without fault.<sup>8</sup> It has no application here. The initial fault was committed by appellant when, despite the warnings from the EXXON NEWARK, he failed to use the navigational instruments available to fix that vessel's position with complete accuracy.<sup>9</sup> There was ample time to do so. When the second warning came, appellant's vessel was already operating at slow speed. It was not in extremis at that juncture. Almost 4 minutes elapsed before the actual passing occurred, and an additional 2 minutes before a collision with the pier was imminent. It cannot be said that appellant had to make hasty decisions, or that the collision followed inevitably from the disablement of the EXXON NEWARK. Rather, it appears that he simply misjudged the turning rate of his vessel on the ill-fated final turn (Tr. 156-157; I.D. 16).

The presumption of fault against the moving vessel which strikes a stationary object, such as a wharf or pier, is well established (I.D. 18). Such accidents do not ordinarily occur "unless the vessel has been mismanaged in some way";<sup>10</sup> and appellant had the burden of going forward with evidence to meet and rebut this inference of negligence. In asserting the defense of unavoidable accident, the navigator "must exhaust every reasonable possibility which the circumstances admit and show that [he] did all that reasonable care required".<sup>11</sup> Appellant's testimony gives no indication that he even considered alternative courses of action, such as stopping and backing, or turning off, before

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<sup>8</sup>Griffin on Collision, §233 (1949).

<sup>9</sup>Commandant v. Buffington, NTSB Order No. EM-57, adopted February 11, 1977.

<sup>10</sup>Petterson Oil Terminals v. The Port Covington, 109 F. Supp, 953 (E.D. Pa. 1952), aff'd 205 F. 2d 694 (3rd Cir. 1953).

<sup>11</sup>Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co., 377 F.2d 724, 726 (5th Cir. 1967).

proceeding into either of the passing situations. Any of these actions would have avoided placing his vessel in extremis, as found by the law judge (I.D. 20). The navigation chart shows that he still had an opportunity to avoid the collision if he had turned left instead of right after passing the EXXON NEWARK, and gone back upstream. He was unwilling to deviate from his chosen course at any time, and thus has no excuse for the consequences.

In sum, we find that appellant failed to take reasonable and practical precautions which would have prevented the collision with Ozol pier, and was guilty of negligent navigation in attempting to "thread the needle" by passing through a 600-foot gap between the HOUSTON and the pier. The sole purpose of the sanction is to insure more caution on his part in future situations where a casualty may be avoided by observing rules of prudent seamanship.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and
2. The orders of the Commandant and the law judge suspending appellant's license No. 428069 for 1 month, plus a probated suspension of 3 months, be and they hereby are affirmed.

KING, Chairman, DRIVER, Vice-Chairman, McADAMS, and HOGUE, Members of Board, concurred in the above opinion and order.